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No. 91-918

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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KALAN INC. and
HOSPITAL CORPORATION OF AMERICA,
*Petitioners,*

v.

THE UNITED STATES,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## BRIEF OF BAXTER HEALTHCARE CORPORATION, BULOVA CORPORATION, G.D. SEARLE & CO., GENERAL MOTORS CORPORATION, NATIONAL MEDICAL CARE, INC. (A WHOLLY-OWNED SUBSIDIARY OF W.R. GRACE & CO.), SEARS, ROEBUCK AND CO., SUNDSTRAND CORPORATION, VOLVO/GM HEAVY TRUCK CORPORATION, AND ZENITH ELECTRONICS CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether, under 19 U.S.C. § 1520(d), U.S. importers are entitled to interest on excess duties required to be deposited at the time of entry of merchandise into the United States, when the U.S. Customs Service refunds such excess duties pursuant to an administrative protest or court order?

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## INTEREST OF THE *AMICI CURIAE*

Baxter Healthcare Corporation (hereinafter "Baxter") is incorporated in Delaware and has facilities in forty states, as well as the District of Columbia, and twenty-eight foreign countries. It is the leading international manufacturer and marketer of healthcare products, sys-

tems and services. Revenue generated from its worldwide operations was $8.9 billion in calendar year 1991.

Joining Baxter as *amici curiae* are Bulova Corporation, G.D. Searle & Co., General Motors Corporation, National Medical Care, Inc., Sears, Roebuck and Co., Sundstrand Corporation, Volvo/G.M. Heavy Truck Corporation and Zenith Electronics Corporation. These companies are major manufacturers or distributors in the United States and represent important segments of their respective industries.

Although the *amici* manufacture or purchase many of their products in the United States, they also operate foreign production plants and import significant quantities of manufactured products and raw materials. By virtue of such foreign sourcing, the *amici* are involved on a continuing basis with the U.S. Customs Service which has both the authority and responsibility for assessing duties on goods entering the United States.[1]

As the result of the *amici*'s status as significant importers, they are unreasonably burdened financially when the Customs Service collects duties in excess of those warranted by law. The reach of the court of appeals' decisions allowing Customs to retain such overcharges with-

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[1] The customs duties that are imposed on imported merchandise are levied based on the tariff classification of such merchandise into different tariff provisions. These provisions are established by law and to an increasing degree are harmonized with similar classification schemes used by trading partners of the United States. The particular classification of many products is well-established and routine. In many instances, however, tariff provisions are ambiguous and merchandise may not clearly fall into any one specific provision. This uncertainty may result in disagreements between the importer and the Customs Service as to the proper classification of the goods. In such situations, the Customs Service typically will require an importer to enter the merchandise under a specific tariff provision with a particular duty applicable to the merchandise so classified. Estimated customs duties are then deposited by the importer when the merchandise is formally entered into the United States.

out compensation to importers thus touches virtually all who import goods into the United States. In one case alone, the most costly situation with Customs now confronting Baxter, it is seeking duty refunds of approximately 4.4 million dollars and some of those allegedly excess duties have been held by the Customs Service for as long as seven years.[2]

## SUMMARY OF ARGUMENT

Prior to enactment of the 1984 legislation,[3] the law was clear that if Customs liquidated[4] an import entry with either duty increase or a duty refund (from the time of estimated duty deposit upon importation), no interest accrued in favor of either party.[5] Moreover, in the event of a duty increase, in addition to there being no provision for interest, there was no fixed date by which payment had to be made.[6] Congress sought to correct this situation by providing for interest due the Customs Service on duty increases following liquidation or reliquidation while at the same time providing for the payment of interest to importers on the amount of the overcharge

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[2] If an importer wishes to dispute the classification determined by Customs and the applicable duty rate, it often must wait months, and sometimes years, for the entry of the merchandise to be processed by the Customs Service and for the completion of the administrative protest procedure. During this entire period, the Customs Service retains the estimated duties paid by the importer.

[3] Section 210 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2977, codified at 19 U.S.C. 1505(c) and 1520(d).

[4] "Liquidation" is Customs' final determination of all aspects of the entry including tariff classification and applicable duties associated with the imported product. An importer may pursue any claims for a duty adjustment or refund by filing a protest with Customs within 90 days after liquidation. 19 U.S.C. § 1514.

[5] H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67, *reprinted in* Appendix F to the Petition at 35a.

[6] Pet. App. 35a.

paid by them.[7] This latter provision was viewed by the House Ways and Means Committee as reciprocal and inherently fair.[8] Remarkably, the court below viewed the Committee's discussion of the prior law as signalling an intent not to change it and chided the Court of International Trade for having "ignored the House Report." [9]

Under Customs' present policy, if *amici* protest the amount of duty demanded by Customs upon liquidation and prevail, Customs pays interest only on the refund of any overcharged duties first assessed *upon liquidation.* Thus, if the overcharged duties were first assessed at the time of liquidation, Customs will pay interest on any overcharge of duties, from the date of liquidation to the date of the refund. If, on the other hand, the overcharged duties were paid *at the time of entry,* as is most often the case, and remain unchanged upon liquidation, Customs will not pay interest on any refunded duties.

This policy has led to absurd and unjust results. Customs has complete discretion to set the amount of duties, based solely on its classification of the imported merchandise. In some cases, Customs will direct that excess duties be deposited at the time of entry. In other instances, Customs demands additional duties upon liquidation, based on its reclassification of the merchandise. Despite the identical result in both circumstances (*i.e.*, duty overcharge), Customs refuses to pay any interest in the former situation, even though it will have retained the importer's money for a *longer* period of time (*i.e.*, date of entry versus date of liquidation).

The *amici*, and thousands of other importers, are severely and adversely affected by this "no interest" policy because the overpayment of duties can equal millions of dollars and the use of the monies involved can be denied to the importer for years pending completion of adminis-

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[7] *Id.* at 36a-37a.

[8] *Id.* at 37a.

[9] *Id.* at 9a.

trative protest procedures and, in many cases, litigation. The loss of use of such funds translates directly into additional costs for the companies in the form of increased financing expenses, reduced profits, and in the most egregious cases, where the duty rate is high and the delay long, cessation of business operations. These costs detract from the competitiveness of U.S. companies and thwart Congress' efforts to alleviate this unwarranted government burden on their balance sheets.

The magnitude of the loss confronted by U.S. importers can be appreciated by considering the sheer volume of import transactions. Recently, for example, the U.S. Customs Service estimated that in fiscal year 1989 it processed nine million entries and it collected 18.6 billion dollars in duties.[10] Customs estimated that more than $20 billion in duties would be collected in fiscal year 1991 and that this level would double in 10 years.[11] Even if only a small percentage of imports are embroiled in controversy respecting the appropriate duties to be paid, the cost to importers resulting from the uncompensated imposition of excessive duties is enormous. Moreover, by the Treasury Department's own accounting, the average period of time between liquidation and a court decision resolving any dispute is approximately 46 months.[12]

More fundamentally, and as discussed in the argument of the *amici curiae*, the Customs Service policy and the court of appeals' decision upholding it disregard the will

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[10] *Hearings before the Subcomm. on Trade of the House Committee on Ways and Means*, 101st Cong., 2d Sess. 44-45 (1990), Serial 101-93 (Statement of the Commissioner, U.S. Customs Service).

[11] *Hearings on Commercial Operations of the U.S. Customs Service, Subcomm. on Trade of the House Committee on Ways & Means*, 101st Cong., 2d Sess. 15 (1990), Serial 101-99 (Statement of the Commissioner U.S. Customs Service).

[12] *Hearings on the Customs Courts Act of 1980, Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 88-89 (1980), Serial No. 31.

of Congress as codified in the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984). The policy also eliminates all financial incentive for the Customs Service to resolve quickly disputes affecting classifications and applicable duty rates because the entire cost of funding the excessive amount of duties, prior to their refund by the Customs Service, is borne by the importer of record.

It is for the foregoing reasons that Baxter and the other *amici* support Kalan Inc. and Hospital Corporation of America in their joint petition for a writ of certiorari to the Court of Appeals for the Federal Circuit respecting its decision in *Kalan Inc. v. United States*, 944 F.2d 847 (Fed. Cir. 1991) and *Hospital Corporation of America v. United States*, (Court No. 89-08-00462) (November 23, 1990).

## ARGUMENT

### THE WRIT SHOULD BE GRANTED TO CORRECT THE FAR-REACHING, ERRONEOUS AND UNFAIR CUSTOMS SERVICE POLICY AFFECTING INTEREST ON REFUNDS

### I. CONGRESS SPECIFICALLY PROVIDED FOR THE PAYMENT OF INTEREST TO IMPORTERS WHEN EXCESSIVE DUTIES ARE REFUNDED

The idea of compensating importers for the financial cost associated with the Customs Service's over collection of customs duties was first addressed by Congress in the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980). Section 301 of that law authorizes the Court of International Trade to award interest, commencing on the date of the filing of a summons, to a successful plaintiff when the result of its lawsuit is the refund of customs duties.[13]

Four years later, Congress passed the Trade and Tariff Act of 1984, *supra*, which expanded the scope of relief

[13] 28 U.S.C. § 2644.

afforded to importers who prevail in obtaining a refund of customs duties. Section 210 of the Act, 19 U.S.C. § 1520(d), directs that interest also be paid on any increased or additional duties when reliquidation of the entry results in a refund of duties. The date from which interest is to be computed is extended by this provision to the date of payment of the liquidated duties.

The above cited provisions evince an unmistakable Congressional intent to make importers whole for any financial costs that they have suffered by reason of the deprivation of such excess duties as are improperly held by the Customs Service. The court of appeals' decisions in *Kalan Inc.* and *Hospital Corporation of America*, *supra*, misconstrue the meaning of these statutory provisions and, thus, erroneously deny to the petitioners, and all similarly situated importers, the benefit of the interest award that Congress has mandated be paid.

### A. The Customs Courts Act of 1980 First Provided for the Payment of Interest to Importers

Section 2644 to title 28 of the U.S. Code became law with the enactment of the 1980 Act.[14] This section is important for two reasons. First, its passage reveals that the Congressional purpose was to mitigate the loss to importers caused by the wrongful retention of excess duties. Second, because the provision is referenced in the 1984 House Committee Report on section 1520(d),[15] it affords some insight into the intent of Congress in en-

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[14] The provision reads as follows:

> If, in a civil action in the Court of International Trade under Section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed at an annual rate established under Section 6621 of the Internal Revenue Code of 1954. Such interest shall be calculated from the date of filing of the summons in such action to the date of the refund.

[15] H.R. Rep. No. 1015, 98th Cong., 2d Sess. *reprinted in* 1984 U.S. Code Cong. & Ad. News 4960, 5027.

larging the scope of the provision for the payment of interest beyond that originally provided for in 1980.

It is instructive to consider how Congress in 1980 characterized its attem to redress the costs inflicted on an importer by reason of the Custom Service's collection of too much duty. In pertinent part, the Report of the Committee on the Judiciary accompanying the Customs Courts Act of 1980 reads as follows:

> During the hearings, a member of the private bar urged that the Government pay an importer interest on a refund of excess customs duties because the time between payment of customs duties and the date of the refund pursuant to a court judgment may be as long as four or five years. The Association of the Customs Bar felt it would be desirable to have interest awarded since "the importer must have paid all assessed duties before he can commence an action in the Court of International Trade."
>
> . . . The Subcommittee was persuaded by the concerns of the private bar and adopted an amendment authorizing the Court of International Trade to award interest on a refund of excess customs duties to an importer plaintiff . . . .

H.R. Rep. No. 1235, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3753. Significantly, Congress chose not to qualify the scope and type of refunded duties made eligible for payment of interest. All excess customs duties refunded in connection with a court judgment or stipulation agreement became subject to the payment of interest with the enactment of this provision.[16] The only explicit limitation was that interest would be computed from the date a summons was filed commencing an action to recover the excess duties.[17]

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[16] The Court of Appeals conceded this in its *Kalan* decision, 944 F.2d 847, 848-849 (1991).

[17] It is noteworthy that the Court of International Trade has jurisdiction over contested Customs' decisions arising from protest

The fact that Congress was not only attempting to make importers whole by the payment of interest but also seeking to make the duty determination process more efficient is demonstrated by an excerpt from hearing testimony that is expressly cited in the Report of the House Committee on the Judiciary.[18]

> I have outlined a little formula in my prepared statement using the rate of inflation together with the current rate of interest. It's not unusual for cases to drag on for 5 or 6 years and even when you win your case, how much is left after 5 or 6 years? I just don't think its simple justice. How could anybody be made whole if he's going to get half his money back after 5 years? . . . My opinion is that if you put something like this in the bill, you will probably increase the likelihood that they will act about five times faster than they do now, which would be a tremendous improvement not only administratively as far as the customs service is concerned but also as far as the Attorney General's office is concerned . . . .[19]

### B. The Trade and Tariff Act of 1984 Extended the Scope of the Interest Payment Period to the Date of Liquidation

With the enactment of 19 U.S.C. § 1520(d) as part of the 1984 Trade and Tariff Act, Congress reached

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procedures only if all liquidated duties have been paid at the time that the action is commenced. 28 U.S.C. § 2637. Quite significantly, duties deposited at the time of entry are considered to satisfy this provision relating to liquidated duties.

[18] H.R. Rep. No. 1235, *supra*, at 3753-54. The same Judiciary Committee Report states that the Justice Department did not oppose the awarding of interset. *Id.* The Treasury Department was largely silent on the issue but did provide projections regarding the additional cost that would be incurred if interest were to be made payable to a point earlier in time than the summons filing date, *e.g.*, the date of liquidation or protest approval date. *See Hearings*, *supra* note 12, at 88-89.

[19] *See Hearings, supra* note 12, at 129.

beyond the provisions of the 1980 Customs Courts Act to extend the payment of interest to a point in time preceding the filing of a summons. The date chosen was the date duties are deemed to be paid, which is generally the date the relevant customs entry is liquidated by Customs.

The reason for this legislative action is clear and does not appear to be the subject of any dispute. Congress, confronted by a decision of the Court of Customs and Patent Appeals which permitted importers to defer for as long as 180 days the payment of duties determined to be due at liquidation,[20] was convinced that an earlier due date must be established and that delinquent payments by importers be made subject to interest. Both the due date and the requirement that interest be paid on any payments made more than 15 days after liquidation were incorporated in section 1505(c).[21]

Keenly aware of the need to act in an even handed manner, Congress in section 1520(d) simultaneously made provision for the U.S. Treasury to pay interest to importers in situations in which the U.S. Customs Service determined that overcharges of duties had been made.[22] Thus, Congress directed that in making duty

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[20] *United States v. Heraeus-Amersil, Inc.*, 671 F.2d 1356 (C.C.P.A. 1982).

[21] 19 U.S.C. § 1505(c).

[22] The report of the House Ways and Means Committee on section 203 of H.R. 6064, the provision that ultimately became section 210 of P.L. 98-573, states in pertinent part:

> This section would also amend section 520 of the Tariff Act of 1930 (19 U.S.C. 1520) by adding a new paragraph which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest filed under section 514 of the Act or if any application for relief is made under subsection (c)(1) of Section 520 of the Tariff Act of 1930 or if reliquidation is ordered by an appropriate court. Interest would be paid on the amount of overcharge at a rate to be determined by the Secretary of the Treasury and determined as of the 15th day after the date of

refunds "interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title . . ."

The Committee Report on this provision particularly emphasizes the necessity of equalizing the treatment to be accorded to importers in connection with the payment of interest both when duties are owed to the government and when the government owes the importers a refund of duties:

> The second part of this legislation recognizes the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum.[23]

As a matter of logic, reciprocal treatment, as intended by Congress, would require an importer who has deposited duties in excess of those which it is obligated to pay to receive interest from the date of liquidation, paralleling the interest charges payable to the U.S. Treasury by any importer that fails to pay any duties owed at the time of liquidation.

That the Congressional purpose in enacting section 520(d) was consistent with the intent underlying the 1980 changes in the law (when section 2644 was enacted) is again evidenced by the language in the Committee Report describing the reason for the 1984 amendments:

> . . . It is similar to but, as regards increased or additional duties, goes beyond 28 U.S.C. 2644 which allows interest to be paid to a successful plaintiff

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liquidation or reliquidation. Interest would be calculated from the date of payment to the date of refund or the filing of a summons under 2632 of title 28, United States Code, whichever occurs first.

H.R. Rep. No. 1015, *supra* note 15, at 5026.

[23] *Id.* at 5027.

> in the Court of International Trade but only from the date of filing of the summons.[24]

From the foregoing, the evolution in Congressional thinking on the importer's entitlement to interest on excess duties can be clearly discerned. In 1980, when the first provision was enacted, Congress was intent upon ameliorating the unfair hardship caused to importers who went without compensation for long periods pending the refund of excess duties by Customs. At that time, Congress chose the least expensive alternative and allowed interest only from the date that a summons was filed rather than some earlier date.

In 1984, when Congress acted to ensure the prompt payment of duties by dictating that late payment by an importer would be subject to interest charges, it made sure that importers would be treated in an equitable fashion by providing for interest to be paid to importers when it is determined that excess duties have been held beyond the date of liquidation. The court of appeals' finding to the contrary, predicated on erroneous interpretations of both the legislative history and statutory language of section 1520(d), should not be allowed to stand.

## II. THE COURT OF APPEALS DECISION MISINTERPRETS THE LEGISLATIVE HISTORY OF SECTION 1520(d) AND MISCONSTRUES THE LANGUAGE ADOPTED BY CONGRESS

The court of appeals' decision construing section 1520(d) to allow interest only on such duties as are actually paid at the time of liquidation or reliquidation imposes a restriction that contravenes the legislative intent of the provision and is not justified by its language. Moreover, the court of appeals' interpretation of section 1520(d) is based on its erroneous misinterpretation of

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[24] *Id.*

the legislative history, specifically the pertinent House Report, and its assignment of a specialized meaning to the statutory words "increased or additional duty" despite the lack of any consistent usage of those words in other code provisions or customs practice.

In particular, the court of appeals placed undue reliance on a single sentence in the House Report to conclude that excess deposits of duty, when refunded at liquidation, are not entitled to receive interest. Thus, the court's decision contains the following language, including a quote from the House Report:

> In short, the House Report confirms that neither section 1520(d) nor section 1505(c) changed prior law: "If any excess duties are being refunded, no interest is payable thereon." House Report at 5026. Curiously, the trial Court ignored the House Report.

*Kalan* at 851. The passage in question was clearly misinterpreted by the court of appeals, however, as the paragraph to which the court cited is a description of the way that the law and Customs practice was at the time that section 1520(d) was under consideration. It was not a statement of the effect that Congress hoped section 1520(d) would have.

As is frequently the case, the committee report relating to the provision that ultimately became section 1520(d) discussed existing law at the time, addressed the reasons for the changes proposed in the bill, and specified the effect that the proposed legislation would have on law and practice. Reference to the specific language of the House Report reveals that the sentence on which the court of appeals placed such great emphasis [25] is actually contained in the body of a paragraph

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[25] The court of appeals may have adopted as its own an erroneous reference to this sentence which appeared in the appellate brief of the Department of Justice. *Kalan Inc. v. United States, supra,* Brief for Defendant/Cross-Appellant, United States, Appeal Nos. 91-1117, 91-1163 at 29.

that is devoted entirely to what was the status of the law and agency practice at the time that the bill was under consideration by the committee:

> Currently, a deposit of the estimated duties owed must be made at the time of entry of merchandise, other than entry into warehouse, for transportation, or under bond. If it is determined that additional or increased duties are due, the appropriate customs officer must collect them. If any excess duties are being refunded, no interest is payable thereon. No time limits are fixed for the payment of additional or increased duties, and no interest on such amounts owed can be assessed.

H.R. Rep. No. 1015, *supra* note 15, at 5026. The sentence that the court of appeals quotes in its opinion is thus entirely out of context. The positioning of the language in the Report leaves no doubt but that the situation being described was that which existed at the time that the Report was being prepared,[26] not the result that Congress hoped to achieve with its passage of the provision in question. If this were not the case, then the language in the House Report that immediately follows the language quoted by the court of appeals also would have to be deemed to be the effect Congress intended to achieve. But such an interpretation would be plainly wrong as the lack of a fixed time for the payment of additional or increased duties was the problem that Congress sought to rectify with section 1505(c), the companion provision to 1520(d).

The court of appeals' conclusion that the words "increased or additional duties" possess a uniform meaning throughout the various provisions of applicable customs law, regardless of when and why the diverse measures

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[26] The reference in the House Report, moreover, relates to the refund of excess estimated duties at the time of liquidation as opposed to the refund of excess liquidated duties after protest as was in issue in *Kalan* and *Hospital Corporation of America*.

were enacted, is also unwarranted. The fact that "increased or additional duties" are not terms of art with a singular, determinate meaning is apparent from an examination of the diverse ways in which those words have been used. Thus, although the court of appeals concluded that "increased or additional duties" encompass only those duties collected pursuant to section 1505(b) at the time of liquidation or reliquidation, consideration of how those terms have been used both by Congress and Customs refutes the result reached by the appellate court in *Kalan* and *Hospital Corporation of America.*

Congress has modified "duties" by the adjectives "additional" and "increased" many times in Title 19. These adjectives when used with "duties" are used as modifiers; they are never used in the absolute sense or as a definition, as advocated by the Customs Service and condoned by the court of appeals.

Indeed, most of the increased or additional duties enacted by Congress must be paid at entry, not after liquidation. For example, "discriminating duties," 19 U.S.C. 128, are referred to as "additional" duties in 19 U.S.C. 129. Countervailing duties are "in addition to" "any duties otherwise imposed," 19 U.S.C. 1303(a)(1), 1671(a), as are antidumping duties, 19 U.S.C. 1673.

If goods are not properly marked with country of origin, Congress has provided for "Additional duties for failure to mark" 19 U.S.C. 1304(f) ("in addition to any other duty"). Likewise, the Congress has authorized the president to impose "new or additional duties" to counteract discrimination by foreign countries. 19 U.S.C. 1338. And, many other statutes provide similar authority to the president to proclaim additional or increased duties. *See, e.g.*, 19 U.S.C. 1821, 2111, 2134(a)(2), 2135(c), 2138, 2151, 2154, 1981(a)(1) and (c)(1), and 1336.[27]

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[27] There are numerous other examples. In peril point investigations, the International Trade Commission investigates whether any "increases in duties" are required, 19 U.S.C. 1360(a), and reports

Thus, "additional or increased" duties does not have the meaning which the Customs Service and the court of appeals attempt to bestow. Given Congress' consistent use of the words "additional or increased" as adjectives when used with duties, it would have specifically defined what it meant if this term were supposed to mean "duties which are paid after liquidation"—as distinct from refunded amounts of "overcharged duties" which it said it meant.[28] Since the House Report refers to additional or

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to the President who may increase them, 19 U.S.C. 1351, and report to Congress, 19 U.S.C. 1361.

The President must under certain circumstances apply to all dutiable products of uncooperative major drug producing or drug transit countries "an additional duty" not to exceed 50%. 19 U.S.C. 2492(a)(2).

Congress has prohibited the release of merchandise from warehouse without the posting of a bond for the payment of "all unpaid regular, increased, and additional duties, all unpaid taxes imposed upon or by reason of importation, and all unpaid charges and exactions." 19 U.S.C. 1557(b).

Finally, certain duties on wood are "additional duties". *See* 19 U.S.C. 1202, TSUS, schedule 2, part 4, headnote 4. The Harmonized Tariff Schedules of the United States (HTSUS) refines the entire process one step further and has additional duties being imposed on additional duties: Products classified under HTSUS subheadings 4802.51-4802.53 and 4802.60, shall under certain circumstances be subject to "*an additional duty of 10 percent* ad valorem *and in addition thereto*" an amount equal to the highest export duty. U.S. Note 1. to Section X of the HTSUS, emphasis added. Of course, other additional or increased duties can be added to that.

[28] Moreover, not only does Congress not use "additional or increased" duties as terms of art, neither does the Customs Service. As can be seen from the Customs Service's presentation of the bill to the Trade Subcommittee, Customs used a variety of adjectives to describe what it now claims is defined as additional or increased duties. The most frequently used term was "supplemental" duties. *Hearings and Written Comments Before the Subcommittee on Trade of the House Committee on Ways and Means*, 98th Cong., 1st and 2d Sessions, November 15, 1983 and June 21, 1984, Serial 98-76 (Printed 1985). Customs uses the latter term on its liquidation notices.

increased duties as "the amount of overcharge[d]" duties, the court of appeals' interpretation is incorrect.[29]

Indeed, the interpretation proffered by Customs and adopted by the appellate court, would result in an unjust, unfair Catch-22 situation for importers. Upon the entry of any merchandise, Customs requires an importer to deposit estimated duties based upon Customs' classification of the merchandise, whether or not erroneous. Thus, because Customs may demand that excess, *i.e.*, additional, duties be included in the "estimated duties" that later are applied to pay the liquidated duties, there never is a further occasion in such circumstances for Customs to issue a bill for supplemental duty. Indeed, Customs' own actions ensure that no bill for supplemental duty ever will be issued.

Clearly, importers should not be penalized for depositing the "estimated duties" that Customs demands, for having their estimated duties applied to pay the "additional duties" assessed upon liquidation, and for thereafter properly protesting Customs' actions. It is equally clear that Customs should not be rewarded for demanding that importers deposit excess estimated duties, which can then be applied against the overcharged, additional duties assessed upon liquidation. That is precisely

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[29] The regulation promulgated by the Department of the Treasury implementing its responsibilities with respect to the collection and payment of interest immediately after the enactment of the 1984 legislation perhaps also reveals the absence of any consistent usage involving the words "increased or additional duty". 50 *Fed. Reg.* 21832 (May 29, 1985) From that notice, it is evident that the Treasury Department did not categorize all duties collected or payable at the time of liquidation as increased or additional duties. In fact, the notice speaks more generally in terms of overpayments and underpayments of customs duties. Thus, while the Treasury pronouncement identifies antidumping and countervailing duties as being subject to the interest charge provisions of the 1984 Act, it never refers to them as additional duties even though they are categorized as such elsewhere in customs and trade statutes. 19 U.S.C. §§ 1303, 1671(a) and 1673(a).

the effect that the court of appeals' interpretation would have—simply because Customs wrongfully assesses and collects the overcharge sooner (at entry) rather than later (by means of a bill for supplemental duty upon liquidation), it would allow Customs to avoid paying interest when it refunds the monies that wrongfully were assessed, collected and held. Because the appellate court's interpretation of the statute would lead to absurd and unjust results, it must be rejected. *See, Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

It could not be more clear that this is exactly the type of situation that Congress had in mind when it enacted 19 U.S.C. § 1520(d). The legislative history specifically refers to a "reciprocity of payment of interest." That provision was intended to put Customs and importers on an even footing. In the event that an importer did not pay duty that properly was due and owing, it would be assessed interest on the unpaid amount. However, on the other hand, if Customs overcharged an importer, and the importer thereafter convinced either the courts (through litigation) or Customs (pursuant to an approved protest) that the entry should be reliquidated and the overcharge refunded, the importer would be paid interest on the refunded, overcharged amount.

It is the Court of International Trade that perhaps best summarized the principle here in issue.

> Since the government had use of that money to which it had no rightful claim, 19 U.S.C. 1520(d) allows the importer to collect interest on the refund. The [importer] should not be denied interest because it deposited estimated duties prior to liquidation, rather than wait until after liquidation to pay.[30]

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[30] *Hospital Corporation of America v. United States*, 752 F. Supp. 459 (CIT 1990).

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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